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AZHAR VICTOR

v.

MALAYSIAN AIRLINES SYSTEM SDN BHD

B

HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[CIVIL SUIT NO: 22-2105-2007]
21 FEBRUARY 2012

C ***LABOUR LAW:*** *Employment - Medically boarded out - Application for - Employee suffering from neurological condition - No medical board formed for investigation - Employee deprived of opportunity of having medical board convened - Whether employer in breach of 2005 Memorandum of Understanding ('MOU') - Whether MOU contained* D *implied term requiring employer to convene medical board - Whether employer required to convene medical board - Whether decision to medically board out employee was employer's prerogative - Whether prerogative decision fair, just and reasonable*

E ***CIVIL PROCEDURE:*** *Damages - Application for - Employee suffering from neurological condition - Application for mutual separation scheme and to be medically boarded out rejected - Whether prerogative decision fair, just and reasonable*

The plaintiff was formerly employed by the defendant as its F learning management services manager before retiring after 34 years of service. Since 1977, the plaintiff had been suffering from a neurological condition called 'cerebellar ataxia' which worsened when the plaintiff had a fall a year before his retirement. This caused the plaintiff to be on medical leave for about two and G a half months. The plaintiff then applied for a mutual separation scheme ('MSS') offered by the defendant to its employees but the application was rejected. Subsequently, he applied to be medically boarded out ('MBO') but no medical board was convened by the defendant in order to determine whether the plaintiff was fit to H continue working. Instead, the plaintiff was told by the defendant that he could either recuperate at home until he commenced his leave prior to his retirement or come to work whenever he wanted to do so. Upon examination by the defendant's consultant physician and a consultant neurologist of a private hospital, the

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plaintiff was confirmed as qualified to be boarded out and a letter was sent to notify the defendant of the plaintiff's condition. The plaintiff appealed to the defendant to convene a medical board or alternatively, accept the said specialists' findings and declare him to be eligible to be MBO. However, his appeal proved futile. Hence, the plaintiff filed the instant action, claiming for damages for being deprived of the opportunity of having a medical board convened. It was further contended that the defendant failed to act fairly, in good faith and without discrimination to its employees and was therefore in breach of an implied term in the 2005 Memorandum of Understanding ('MOU'). The issues that arose for the court's determination were (i) whether the MOU contained an implied term requiring the defendant to convene a medical board to verify the plaintiff's fitness to work; (ii) whether the defendant was required to convene a medical board and to refer the plaintiff to the medical board for medical examination for the purpose of giving recommendation; and (iii) whether the decision to MBO the plaintiff was the defendant's prerogative and if so, whether the prerogative decision was fair, just and reasonable.

Held (dismissing claim for damages; allowing application in part):

(1) It was an implied term that the defendant had to convene a medical board where it was fair and just to do so and this case was such a case. Although the discretion to convene a medical board lay with the defendant, it (discretion) was a discretion which had to be exercised fairly and reasonably in good faith and without bias or discrimination which the defendant failed to do. The plaintiff had made an application to be MBO and the defendant's action in allowing the plaintiff to 'recuperate at home' and to come to work as and when he wished, indicate that the defendant did find the plaintiff unfit to carry on with his job. Under such circumstances, it was only fair and reasonable that the defendant should have convened a medical board to investigate further the plaintiff's illness. (para 31)

(2) The defendant was required to convene a medical board and to refer the plaintiff to the medical board for medical examination for the purpose of giving recommendation under art. 35(1)(a) of the MOU. (para 39)

(3) The decision to MBO the plaintiff was the defendant's prerogative. However, the decision not to refer the plaintiff to a medical board was unfair, unjust and unreasonable. This was so since there were reports from medical experts that say that the plaintiff should be MBO since he was unfit to do his job. Under the said MOU 2005, had the defendant referred the plaintiff to a medical board, it would be one which 'Is constituted by the company (defendant) in accordance with the terms and conditions of employment'. Therefore, the company or the defendant had the prerogative to select the composition of the medical board members to investigate into the fitness of the plaintiff to continue to do his job. (para 40)

(4) The plaintiff's claim was based upon the assumption that if a medical board was set up or convened, the medical board would recommend that the plaintiff be MBO and the defendant would accept and act on that recommendation. The plaintiff's initial request was for a medical board to be convened. When the plaintiff's application was refused or rejected, the plaintiff ought to have sought a mandatory injunction for a medical board to be convened by the defendant. (paras 42 & 43)

(5) The plaintiff in its claim was asking the court to not only speculate on the recommendation of the medical board but also to speculate on the decision of the defendant which the court cannot and would not do. The court was not in a position to speculate the outcome of the medical board's recommendation and the findings of the defendant whether to accept or not the medical board's recommendation. This would tantamount to the court usurping the prerogative of the medical board and that of the defendant; and rewriting the MOU 2005 which was a collective agreement made between the defendant and MASMA. (paras 44-54)

Case(s) referred to:

Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Innoprise Corporation Sdn Bhd Sabah v. Sukumaran Vanugopal, Sabah [1993] 1 ILR 373B ***(refd)***

Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***

Pushpadevi Singam v. University of Malaya [1993] 4 CLJ 602 HC ***(refd)***
Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***
Yap Kok Foong v. Colgate Palmolive (M) Sdn Bhd & Anor & Another Case [2000] 1 LNS 150 HC ***(refd)***

For the plaintiff - Sangeet Kaur Deo; M/s Karpal Singh & Co
For the defendant - Christopher Arun; M/s Zaid Ibrahim & Co

Reported by Najib Tamby

JUDGMENT

Suraya Othman J:

Introduction

[1] The plaintiff, a former employee of the defendant who held the post of a learning management services manager, brings an action against the defendant for breach of the terms of the Memorandum of Understanding ("MOU 2005") between the defendant and the Malaysian Airline System Managerial Staff Association 2005 ("MASMA") under which both the plaintiff and defendant are bound. The complaint, in short, is that the plaintiff was entitled to be medically boarded out ("MBO") under art. 35 of the MOU 2005 since his health and medical condition does not allow him to perform his job. However, the defendant failed to exercise its discretion in a fair and judicious manner when deciding not to convene a medical board to investigate the plaintiff's health and medical condition for the purpose of art. 35 of the MOU 2005. The plaintiff then filed this suit for breach claiming for special damages to the amount of RM443,567.42 (being the amount which the plaintiff would have received as gratuity for being MBO), general damages including aggravated and exemplary damages, interest, costs and any other or further relief deemed fit and proper by the court.

[2] This court in its decision disallowed the plaintiff's claim for all forms of damages and instead ordered the defendant under its power and discretion to give relief which it deemed fit and proper in the circumstances of the case, to convene a medical board, to investigate the fitness of the plaintiff to continue in his employment with the defendant and to make a recommendation to the

defendant under art. 35 of the MOU 2005 for the purpose of him being considered to be MBO. The defendant dissatisfied, appealed against this court's decision.

Background Facts

[3] The plaintiff resides at No 7, USJ 11/3M, 47620 Subang Jaya, Selangor Darul Ehsan and was a former employee of the defendant.

[4] The defendant is a limited company incorporated under the Companies Act 1965 with its registered address at 3rd Floor, Administration Building 1, MAS Complex A, Sultan Abdul Aziz Shah Airport, 47200 Subang, Selangor Darul Ehsan, Malaysia.

[5] The plaintiff commenced his employment with the defendant on 18 October 1972 as a cabin services assistant and the plaintiff's last post was that of a learning management services manager, Malaysia Airline Academy with a salary of RM 9,642.77 per month. The plaintiff had been in service with the defendant for 34 years before retiring on 10 April 2007.

[6] Salaries, terms and conditions of the plaintiff's employment are contained in the Memorandum of Understanding ("the MOU 2005") signed by the defendant and Malaysian Airline system Managerial Staff Association ("MASMA") on behalf of the managerial staff.

[7] The plaintiff state that it is an implied term of the MOU 2005 that the defendant has a duty to set up a medical board to certify whether he was unfit to work and should have been medically boarded out if his health warranted such an enquiry.

[8] The plaintiff fell at 9pm on 27 February 2006 when he was preparing for the MAS Annual General Meeting which was held at the Malaysian Airlines Academy on 28 February 2006 causing a fracture of his right wrist in addition to suffering head and other injuries. The plaintiff alleged that the fall aggravated his neurological condition termed as cerebellar ataxia which he had been suffering since 1977.

[9] Due to the fall, the plaintiff was on medical leave for about two and half months. During this period he received treatment from the Subang Jaya Medical Centre ("SJMC").

[10] The plaintiff pleads that the defendant subsequently, as a cost cutting measure, offered a mutual separation scheme ("MSS") to all confirmed and permanent Malaysian employees *vide* its letter dated 24 May 2006. The commencement date for the above scheme was on 24 May 2006 and the closing date was 7 June 2006.

[11] The plaintiff applied for the MSS and his application was rejected on 6 July 2006 and he appealed to the defendant on the same day to reconsider his application due to his current medical condition. On 15 August 2006, the defendant issued a circular giving its rationale why letters of appeals were not being entertained.

[12] The plaintiff then applied by letter dated 24 August 2006 to be medically boarded out. However, no medical board was convened by the defendant to decide on the plaintiff's application. The plaintiff instead was asked to recuperate at home until he commenced his leave prior to retirement on 10 April 2007. The plaintiff was also given the liberty to come to work whenever he wanted to do so.

[13] Subsequently, the plaintiff appealed to the managing director of the defendant and twice requested for an appointment to meet him. The plaintiff contended that he was examined by the senior manager, MAS medical services consultant physician Dr Daljit Singh Parmar, PW2 and Assunta Hospital consultant neurologist Datuk Dr Raihanah Abdul Khalid, PW3 who confirmed that he was qualified to be medically boarded out. By a letter dated 6 December 2006 and postmarked 20 December 2006, the senior general manager of Human Resource of the defendant, Encik Effendi Abdul Rahman notified the plaintiff that the defendant had decided not to accommodate his request to be MBO.

[14] The plaintiff appealed to the managing director by letters dated 20 December 2006 and 28 April 2007 and also *vide* his solicitor's letter dated 23 January 2007 to defendant to convene a medical board without delay to deliberate on his condition or in the alternative to accept the findings of the said medical experts and declare him to be eligible to be medically boarded out.

[15] The defendant refused to accede to the said request of the plaintiff. The plaintiff then filed this suit in court alleging that the defendant has breached the terms of the MOU 2005 by failing to convene a medical board to assess his health and pray for general, special, aggravated and exemplary damages due to this breach.

Plaintiff's Contention

[16] Ms Sangeet Kaur Deo, counsel for the plaintiff submitted that the plaintiff was not claiming for a medical board to be convened but is claiming for damages for having been deprived of the opportunity of having the board convened.

[17] Ms Sangeet Kaur Deo submitted that the plaintiff was diagnosed with a neurological condition known as cerebellar ataxia from as early as 1977 and his condition worsened progressively throughout the years. He had a fall in 27 February 2007 and fractured his right wrist in addition to suffering head and other injuries which aggravated his cerebellar ataxia. He was examined by Dr Daljit Singh Parmar, PW2 and Datuk Dr Raihanah Abdul Khalid, PW3 who confirmed that the plaintiff is unfit to continue with his employment and advised that he be immediately MBO. The medical reports were forwarded to the defendant. The plaintiff was also certified by the SOCSO medical board to be medically unfit.

[18] Ms Sangeet Kaur stated that the plaintiff had applied for MMS due to his medical condition. His application was rejected. He then applied to be MBO. This too was rejected. The plaintiff appealed against the rejection and was given two options; to recuperate at home with full pay or to come to work whenever he wanted to do so. Ms Sangeet Kaur submitted that the defendant's action in allowing the plaintiff to recuperate at home clearly conceded that the plaintiff was in fact unfit to work.

[19] Ms Sangeet Kaur argued that there is an implied term under the MOU 2005 for the defendant to act fairly, in good faith and without discrimination in its treatment of its employees which in this case the defendant failed to do so. As such Ms Sangeet Kaur prayed for the plaintiffs claim to be allowed with costs.

Defendant's Contention

[20] Mr Christopher Arun, counsel for the defendant on the other hand, contended that the terms and conditions of the plaintiff's employment are subjected to the MOU 2005 and the

Human Resources Policy Manual dated 1 April 1994 which provide that it is the defendant's absolute prerogative to refer any of its employee who is suffering from health conditions, which caused them to be unable to continue with their work or any alternative work, to the medical board.

[21] Mr. Christopher Arun did not deny that the plaintiff fell when he was preparing for the MAS Annual General Meeting which was held at the Malaysian Airlines Academy on 28 February 2006 but denied that the fall and injuries suffered by the plaintiff were caused by or contributed to the plaintiffs long working hours on that day.

[22] Mr Christopher Arun contended that the plaintiff is not entitled to the benefits for MBO under the art. 35 of the MOU 2005 based on the reasons, amongst others, that he has retired from his employment with the defendant on 10 April 2007.

[23] Counsel argued that there are no terms or conditions, whether express or implied, in the MOU 2005 that makes it compulsory or can compel the defendant to convene a medical board or to refer the plaintiff to the said medical board to inquire into his health condition for the purpose of giving any recommendation to the defendant under art. 35 of the MOU 2005. Consequently, the defendant is under no obligation or duty to convene a medical board or to refer the plaintiff to one.

[24] Counsel further argued that in any event, even if the plaintiff is referred to the medical board and the medical board recommends that the plaintiff be medically boarded out, the defendant is not bound by the recommendation of the medical board and it is the defendant's absolute prerogative whether to accept the said recommendation or otherwise.

[25] Counsel submitted that art. 35 of the MOU 2005 refers to a gratuity scheme for those who are MBO and the word "gratuity" which means "a gift of money over and above payment due for service" makes it clear that it is within the prerogative of the defendant to decide whether the plaintiff is entitled to it or not.

[26] Counsel states that the plaintiff is not prevented from carrying out his main function, tasks and work responsibilities by his cerebellar ataxia neurological condition and his level of health

at that point of time and as a learning management services manager which is a management post, the plaintiff can and only need to give work's instructions to his subordinates who report to him to execute the specific and related tasks. The plaintiff could also provide his work report to his superiors through telephone.

[27] Counsel further states that prior to the plaintiffs letter dated 6 December 2006 by Encik Effendi Abdul Rahman, the senior general manager of Human Resource, the plaintiff had been given the liberty to recuperate at home with full pay until he finished his annual outstanding leave before he retires on 10 April 2007. The plaintiff is also given the liberty to come to work whenever he feels he want to do so.

[28] Further counsel contended that the plaintiff's claim is wrong, premature and or is a misunderstanding in both fact and law as the plaintiff has failed to comply with the procedures to file his grievances in accordance with the terms of the MOU 2005. As such the defendant prayed that the plaintiffs claim to be dismissed with costs.

Issues To Be Tried

[29] The issues to be tried are:

Q1 : Whether there is an implied term in the MOU 2005 that the defendant is required to convene a Medical Board if the plaintiff's condition requires investigation for the purpose of verifying whether the plaintiff is fit for work or whether he should be medically boarded out ("MBO").

Q2 : Whether the defendant was required to convene a medical board and to refer the plaintiff to the medical board for medical examination for the purpose of giving recommendation under art. 35(1)(a) MOU 2005?

Q3 : Whether the decision to MBO the plaintiff was the defendant's prerogative.

Q4 : The issue which must be determined here is whether the prerogative decision of the defendant not to convene a medical board on the basis that the plaintiff is still fit to do his job as a learning management services manager is a prerogative decision which is fair, just and reasonable without discrimination and bias.

Decision Of The Court

[30] Article 35 of MOU 2005 states:

> 35 Gratuity Scheme For Staff Who Are Medically Boarded Out, Permanently Disabled Or Who Die Whilst In The Services Of The Company.
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> (1) The benefits set out in paragraphs (2) of this article shall, subject to the provisions of paragraph (3) of this article, be paid if any staff:
>
> (a) is medically boarded out on the recommendations of the Medical Board contained in a report stating that they have examined the staff concerned and, in their considered opinion, the staff is permanently incapacitated from continuing in his employment or from taking up any form of alternate employment compatible with his qualifications, experience and salary;
>
> (b) dies whilst in the service of the company.

[31] The Human Resources Policy Manual dated 1 April 1994 states:

Malaysia AIRLINES	PART VII	MEDICAL AND HEALTH
Human Resources Policy Manual	Section 5	Medical Board

On the recommendation of the company/government doctors that an employee is suffering from such illness as to permanently incapacitate him from continuing in his employment or from taking up any form of alternative employment, the company may refer the employee to the Medical Board constituted by the company in accordance with his Terms and Conditions of employment.

Q1 : Whether there is an implied term in the MOU 2005 that the defendant is required to convene a Medical Board if the plaintiffs condition requires investigation for the purpose of verifying whether the plaintiff is fit for work or whether he should be medically boarded out ("MBO").

A : Yes it is an implied term that the defendant has to convene a medical board where it is fair and just to do so. This case was such a case. Although the discretion to convene a medical board lies with the defendant as seen in the human resource policy manual dated 1 April 1994 from the word used "may refer the employee to the medical board constituted by the company", it (discretion) was a discretion which has to be exercised fairly and reasonably in good faith and without bias or discrimination and this the defendant failed to do.

[32] In *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159, the Supreme Court held as follows at p. 168:

> So is Lord Green MR's speech in the *Wednesbury Corp* case [1948] 1 KB 223 at p 229, explaining the meaning of 'unreasonableness' in its broad or comprehensive sense:
>
> I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty-those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable'.
>
> It is true the discretion must be experienced reasonably. Now what does that mean? Lawyers familiar with phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.

[33] This case was later applied in *Yap Kok Foong v. Colgate Palmolive (M) Sdn Bhd & Anor & Another Case* [2000] 1 LNS 150 [tab 5] by Justice Faiza Tamby Chik.

[34] In *Innoprise Corporation Sdn Bhd Sabah v. Sukumaran Vanugopal, Sabah* [1993] 1 ILR 373B, [tab 6] the Industrial Court, Kota Kinabalu held as follows:

> each of the three above contracts of employment earned a clause that the managing director shall at his absolute discretion vary or modify any of the Terms and Conditions of Service from time to time as he deems fit and further that the renewal of the claimants contract will be at the absolute of the Managing Director. This absolute discretion appears with respect to place the claimant at the absolute mercy of the Managing Director.

> This Court must restate the basic principle of industrial law that such an absolute discretion vested in the Managing Director cannot be exercised arbitrarily, capriciously or in a manner that will amount to victimization of a workman or an unfair labour practice. Am employers freedom to contract must yield to the higher claims of social justice.

See also the cases of *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5 and *Pushpadevi Singam v. University of Malaya* [1993] 4 CLJ 602.

[35] The plaintiff had made an application to be MBO and the defendant's action in allowing the plaintiff to "recuperate at home" and to come to work as and when he wishes, indicate that the defendant did find the plaintiff unfit to carry on with his job and in such circumstances it is only fair and reasonable that the defendant should have convened a medical board to investigate further the plaintiff's illness.

Q2 : Whether the defendant was required to convene a medical board and to refer the plaintiff to the medical board for medical examination for the purpose of giving recommendation under Article 35(1)(a) MOU

A : Yes.

Q3 : Whether the decision to MBO the plaintiff was the defendant's prerogative.

A : Yes, but the decision must be judiciously exercised in a fair, just and reasonable manner without discrimination and bias.

Q4 : The issue which must be determined here is whether the prerogative decision of the defendant not to convene a medical board on the basis that the plaintiff is still fit to do his job as a learning management services manager is a prerogative decision which is fair, just and reasonable without discrimination and bias.

A : From the facts of the case, the decision not to refer the plaintiff to medical board (rejection of the setting up of a medical board) was not fair, just or reasonable without discrimination and bias. This is so since there were reports from medical experts that say that the plaintiff should be MBO since he is unfit to do his job. It is only fair, just and reasonable that the defendant set up a medical board

A to investigate further and await the recommendation of the medical board. The report of the defendant's senior manager MAS medical services Dr Daljit Singh Parmar, PW2, (P3) stated that the plaintiff "has unstable gait with poor co-ordination and difficulty with fine movements. His speech is affected due to slurring, making it difficult B at times to comprehend what he is saying. Due to progression of his ailment, he is now more comfortable in a wheelchair, having difficulty ambulating with a walking stick and compounded with his fear of falling again.

C **[36]** The two reports of the consultant neurologist of Assunta Hospital, Datuk Dr Raihanah Abdul Khalid, PW3 (P2 and P4) are even more compelling. She unequivocally found the plaintiff medically unfit for work and advice immediate medical board-out. She stated in her report, P2 that:

D In conclusion Mr Azhar has cerebellar ataxia, most likely familial in origin. This is a neurological disorder which is chronic and will show gradual worsening of the balance system over the years. Mr Azhar is already at the stage where he needs aid with ambulation and has been sustaining injuries due to imbalance and E this will inexorably progress to the stage where he will be wheelchair bound. His application for a medical board review in thus timely.

[37] In her report in P4, she has this to say:

F I have examined Mr Azhar and find his condition to have worsened considerably. He is unable to stand and walk, and is now wheelchair bound. This is compounded by postural giddiness on standing, and I have advised him to continue use of wheelchair to avoid falls. He has pain in both knees and increased stiffness of both shoulders. He is also unable to use his right G hand for writing, eating etc and is now dependant on the left for all activities. His speech is also more slurred and difficult to understand at times. I find him to be medically unfit for work and advise immediate medical board out.

H **[38]** In evidence, at pp. 42 and 43, PW3 said this:

17. Q : At the time you make this report, are you aware of the position he held?

A : I believe that he mentioned he was Senior Service I Manager.

18. Q : Were you aware of what his job entailed?

A : Not in great detail but he did mention that he needed a lot of running around and assessment of the various I think services within his department.

19. Q : Now, knowing, what his job entails and also knowing his medical condition at that time, would you say he is fit to carry out such duties and running around?

A : When I saw him I thought, he was having a lot of difficulties in coping. He needed to use crutches at work. He had to use the stairs a lot and I do not believed that the place of work was disable friendly and he had falls both at his work place as well as at home. We suggest that the ataxia was getting to a significant extent or worst.

20. Q : Could you say he was fit at the point of time?

A : No, not at the time. Not fit for employment.

21. Q : I refer you to the last paragraph at page 38. In particular in very last line, "... In his application for a medical board review is thus timely ..." Why did you made that statement?

A : Knowing of the disease itself, you may be able to cope at the early stages. A lot of people are still able to mobilize although with difficulty. They may not be able to do a lot of physical activities that the rest may be able to do but with time it gets worst and at this point with background history with frequent falls sustaining injuries, leading to quite considerable amount of time away from work and difficulty coping with daily activities, I thought that the disease had reached at a stage where it was showing a lot of mobility and if he was probably to continue to work he would have been at risk of further falls.

22. Q : Can I now refer you to your report at page 70 and this was one month after and there was preceding report and you said 'I have examined Mr Azhar today and find his condition to have worsened considerably. This will be just one month after that. He is unable to stand and walk and is now wheel-chair bound. This is compounded by postural giddiness on standing and I have advised him to continue use of the wheel-chair to avoid falls. He has

A pain in both knees and increased stiffness of both shoulders. He is also unable to use his right hand for writing, eating etc., and is now dependent on the left for all activities. His speech is also more slurred and difficult to understand at times'. I find him to be medically unfit for work and advise immediate medical board out?

B So again doctor you have in no uncertain terms stated that you find him medically unfit for work and advise immediate medical board out?

C A : That was the condition at that time when I saw him.

[39] Therefore with all these reports sent to the defendant for its consideration, it is only fair and reasonable to expect the defendant to act on it and convene a medical board to further investigate the fitness of the plaintiff for the purpose of art. 35 of D the MOU 2005. The evidence of PW2 and PW3 further supports the medical reports.

[40] Be that it as it may under the said MOU 2005, if the defendant refers the plaintiff to a medical board, it is one which E "is constituted by the company (defendant) in accordance with the terms and conditions of employment." Therefore the company or the defendant has the prerogative to select the composition of the medical board members to investigate into the fitness of the plaintiff to continue to do his job, that is, the setting up of the F medical board must be under the concept of the said MOU 2005.

[41] Since the medical board has not been set up as yet by the defendant, this court feels that it is not correct or proper for this court to make a finding that if a medical board is set up it will G necessarily make a recommendation that the plaintiff will be MBO. This is an assumption and if this court were to make such an assumption, this court will be usurping the prerogative of the medical board which this court is not in a position to do at this juncture.

H **[42]** Again, it must be stressed here that the plaintiff's claim is based on the assumption that if a medical board is set up or convened, the medical board will recommend that the plaintiff be MBO and the defendant will accept and act on that recommendation.

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[43] The plaintiff's initial request is for a medical board to be convened. This the plaintiff did through its letter of application dated 2 March 2007. When the plaintiff's application was refused or rejected, the plaintiff ought to have sought a mandatory injunction for a medical board to be convened by the defendant. This the plaintiff failed to do. Even if a medical board is set up or convened, this court does not know what the recommendations of the medical board will be; whether it will recommend to MBO the plaintiff or not. And if, it recommends the plaintiff to be MBO, this court does not know whether the defendant will accept and act on the medical board's recommendation.

[44] As such the plaintiff in its claim is asking this court to not only speculate on the recommendation of the medical board but also to speculate on the decision of the defendant. This the court cannot and will not do.

[45] As rightly submitted by the defence counsel, if this is what the plaintiff requires the court to do, the plaintiff should have prayed for a declaration that:

(a) a medical board be set up or convened by the defendant;

(b) the medical board investigate the fitness of the plaintiff to continue in his employment and makes a recommendation;

(c) the defendant is bound to accept and act on the recommendation of the medical board.

This, the plaintiff failed to do.

[46] The plaintiff instead prayed for compensation by way of damages and quantified the damages or losses in the amount that the plaintiff would have received as gratuity if he had been MBO by the defendant. This the defendant did in its prayer under (i) for special damages. Apart from that the plaintiff also prayed for (ii) general damages including aggravated and exemplary damages; (iii) interest; (iv) costs and (v) any other or further relief deemed fit and proper by the honourable court.

[47] If this court allows the plaintiffs claim for special damages, that is (gratuity for being MBO), this court would be rewriting the MOU 2005 and usurping the prerogative of the medical board and the defendant. What more, the court would do so based on the

presumption or assumption that the medical board would recommend that the plaintiff be MOB and that the defendant has accepted and acted upon the medical board's recommendation. This court would then have pre-empted the findings of the medical board and that of the defendant. This, the court would not do.

Prayer Under (V) For Any Other Or Further Relief Deemed Fit And Proper By The Court.

[48] This court has the discretion to make an order under prayer (v) that the defendant convenes a medical board to investigate the fitness of the plaintiff to continue in his employment or to take up any form of alternate employment with the defendant which is compatible with his qualifications, experience and salary as provided under art. 35 of the MOU 2005. This court further orders that the medical board then makes a recommendation to the defendant.

[49] This the court can do even though the plaintiff has not prayed for such a declaration as it an order befitting and proper in the circumstances of the case. As can be seen from the plaintiff's statement of claim, the gist of the plaintiff's grievance is that the defendant failed to convene a medical board when the plaintiff applied by letter dated 24 August 2006 for one to be set up to enquire into his fitness to continue in his employment with the defendant. The plaintiff had followed up on his request for the setting up of a medical board by making several appointments and appeals to the defendant's medical services consultant physician, Dr Daljit Singh Parmar, PW2, and to the managing director of the defendant. Even when the plaintiff's request was rejected, the plaintiff persevered to the last, even after his retirement on 10 April 2007 to instruct his counsel to write to the defendant to reconsider its rejection or refusal to set up a medical board which the plaintiff alleged was based on commercial consideration calculated to benefit the defendant at the expense of the plaintiff and to deprive the plaintiff of much-needed funds to proceed with medical treatment. All these outpouring of dissatisfaction on the part of the defendant's inaction and rejection of the plaintiff's request to convene a medical board can be seen throughout the plaintiff's statement of claim from paras. 8, 9, 15 to 29. As such, though not prayed for specifically, it forms the fabric of the plaintiffs claim.

[50] In the case of *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679, the Court of Appeal held that the prayer in the plaintiff's statement of claim for "other relief that this court deems

fit and just" are not empty words and must not be treated as a mere ornament to pleadings devoid of any meaning. The said prayer was sufficient for the exercise of equitable jurisdiction to mould the decree of specific performance to fit the facts as found by the learned judge. In held [4] of the case, it states:

> [4] There was no merit in the plaintiff's argument that the learned judge gave the plaintiff something he had not asked for. Equitable remedies and doctrines are flexible and adaptable to particular circumstances. The court of equity may therefore mould the relief that is to be granted on particular facts. Further, the prayer in the plaintiff's statement of claim for "other relief that this Honourable Court deems fit and just" was sufficient for the exercise of equitable jurisdiction to mould the decree of specific performance to fit the facts as found by the learned judge (pp 693 e-h & 694a).

[51] At pp. 693 and 694 of the case, Gopal Sri Ram, JCA had this to say:

> A Court of Equity exercises its jurisdiction not in a straight jacketed or inflexible fashion. The whole approach of equity to problems coming within its parameters is one of flexibility based on broad and general doctrines rather than strict and unyielding rules. This is the hallmark of equity and it is in this fundamental respect that equity differs and diverges from common law. Equitable remedies and doctrines are therefore flexible and adaptable to particular circumstances. The Court of Equity may therefore mould the relief that is to be granted on particular facts. So, for example if rescission appears to be the inevitable or indeed the only remedy in a given case, a court of equity may decline to order rescission and instead may order equitable compensation by way of adjustment. The cases of *Gluckstein v. Barnes* [1900] AC 240 and *Disik v. Newton* [1985] and 62 BCLR 1 amply illustrate the malleability of equitable remedies to fit particular circumstances. We therefore find no merit in Mr. Tan's argument.
>
> There is another reason why we would reject the submission of counsel. In his statement of claim the plaintiff also sought a prayer for "other relief that this Honourable Court deems fit and just" Now these are not empty words. As Sailed Abbas FJ observed in another context in *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] 298; [1982] CLJ (Rep) 190:
>
> > In any case, prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning.

[52] In the case of *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190, the Federal Court at p. 198, para g states:

> From these two paragraphs of the statement of claim it is obvious that the respondents' solicitors treated the claim for loss of earnings as falling into two categories - (a) pre-trial loss, which they described it as 'loss of earnings' and (b) future loss of earnings, which they referred to as "prospective loss of earnings." But instead of pleading the pre-trial loss of earnings or "loss of earnings" as they described it as an item under special damages, they erroneously pleaded it as an item under general damages. This is purely a technical mistake, which in our view did not in any way affect the substance or prejudice the appellant - see O.2 (Effect of Non-Compliance) of the rules of the High Court 1980. We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect of legal technicalities. In any case prayer (e) para (7), "Any other relief which this Honourable Court deem fit to grant" must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer and the prayer for "loss of earnings" in para 5(a) should entitle the Court to make such an assessment.

[53] Therefore, in light of our instant case since the fabric of the plaintiff 's claim is based on his grievance of the inaction or rejection by the defendant to convene a medical board to enquire into his fitness to continue in his present employment or alternate employment with the defendant with the view that if he is found to be unfit due to his medical ailments by the medical board, then, he would be recommended to be MBO, the lack of specific prayers should not deter this court to make an order under prayer (v) to meet the end of justice befitting the circumstances of the case.

Conclusion

[54] This court is not in a position to speculate the outcome of the medical board's recommendation and the findings of the defendant whether to accept or not the medical board's recommendation. This would tantamount to the court usurping the prerogative of the medical board and that of the defendant; thus in effect the court would be rewriting the MOU 2005 which is a

collective agreement made between the defendant and MASMA. What the court can do and will do is to exercise its power to make orders it deem fit and proper in the circumstances under prayer (v) of the statement of claim.

[55] As such this court dismissed prayer (i) for special damages to the amount of RM326,163.28; prayer (ii) for general, aggravated and exemplary damages and prayer (iii) for interest on the sums in prayers (i) and (ii).

[56] This court instead makes an order under prayer (v) that the defendant convenes a medical board to investigate the fitness of the plaintiff to continue in his employment or to take up any form of alternate employment which is compatible with his qualifications, experience and salary under art. 35 of the MOU 2005 and then makes a recommendation to the defendant.

[57] This court is aware that the plaintiff has retired on 10 April 2007 but, be that as it may, it does not preclude this court from making such an order.

[58] Plaintiff's claim for prayers (i), (ii), and (iii) are dismissed. Prayer (iv) costs in the sum of RM5,000 is allowed to the plaintiff. Prayer (v) is as stated above.